Supreme Court, U.S.
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No. 92-1807

In The

Supreme Court of the United States

October Term, 1992

GLOBAL DIVERS & CONTRACTORS, INC.,

Petitioner,

vs.

LEEVAC CORPORATION, LEEVAC SHIPYARDS, INC., BOSTON OLD COLONY INSURANCE COMPANY AND LLOYDS OF LONDON AND INSTITUTE COMPANIES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit rendered a decision in conflict with a decision of another United States court of appeals on the interpretation of unambiguous contractual language; or, applied the Louisiana state law of parol evidence in a way which decided a federal question that was in conflict with a state court of last resort; or, applied the well settled principles of Louisiana law such that it departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's discretionary power of supervision.

2. Whether the court of appeals properly affirmed the district court's ruling that under Louisiana state law, parol evidence was inadmissible to vary the terms of a clear and unambiguous contract and correctly applied the parol evidence rule to hold that the indemnity provisions of the contract were clear, unambiguous and obligated Global to release and indemnify Leevac for claims of damage to Global's property.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves a dispute over the interpretation of a release and indemnity provision in a contract between parties involved in conversion work of an oilfield supply vessel. The matter arises from a lawsuit which was initiated following a fire which broke out on the vessel while it was undergoing a conversion.

In late 1987, GLOBAL purchased the M/V WESTERN NARROWS, a mothballed or "stacked" oilfield supply vessel, for $350,000, with the intention of converting it for use in saturation diving operations. In February and March of 1988, negotiations were held between Mike Hill and Rosemary Azar, an attorney on behalf of Global Divers & Contractors, Inc., (Global) and Charles Burrell and James Burke, an attorney, representing Leevac Corporation (Leevac) regarding the conversion of the vessel. These discussions culminated in the preparation of contract documents consisting of a "Master Service Contract" and "Work Order" which were signed by the parties on March 4, 1988 (Pet. App. A40, A50).

The Master Service Contract contained extensive indemnity provisions, commonly referred within the industry as "knock for knock." Under the contract, Global agreed to indemnify Leevac for damage to all of Global's property and Leevac did the same, reciprocally, with respect to its property. Within the contract, the term "property" was defined expansively in explicit terms as "all property (real or personal), equipment, material or supplies belonging to or leased to any party or its invitees." (Pet. 7-8).

These provisions were bargained for at arms length between corporations of equal bargaining strength in a meeting in which both large companies were represented by experienced counsel. During the negotiations meeting, Burke, counsel for Leevac, specifically requested that the onerous, one-way, release and indemnity provision of Global's initial draft contract be replaced by a reciprocal "knock-for-knock" provision because Global contemplated using its own personnel and equipment at Leevac Shipyard during the conversion of the vessel. Burke clearly understood that the term "property" to be used in the release and indemnity agreements meant all vessels including the M/V WESTERN NARROWS.

The contract Work Order also required Leevac to maintain its liability insurance, for which Global would pay Leevac as a material cost item an additional 1.25% to cover the associated expense. Burke found no inconsistency with this provision and the fact that Global was agreeing to reimburse Leevac for the cost of Leevac's liability insurance since Leevac was required to pay its insurer for this insurance regardless of whether Global provided an indemnity under the terms of the policy.

The Work Order also specified that the laws of the State of Louisiana were to govern the agreement and that the Work Order was subject to all the terms and provisions of the Master Service Contract, which included the requirement for Leevac to maintain its liability insurance coverage (Pet. App. A60). Also, Global independently carried hull insurance on the vessel for her full value with London Underwriters, against whom Global has made claim for the damage to the WESTERN NARROWS.

Following the negotiations, final copies of the agreements were prepared by Global, delivered to Leevac and signed on March 4, 1988. Although Charles Burrell signed on behalf of Leevac, his individual understanding of the contract's release/indemnity language is neither binding, relevant, nor representative of that of Leevac since those provisions were negotiated solely by Leevac's attorney, Burke. For over 30 years, Leevac has relied upon the legal counsel and negotiation skills of Mr. Burke. Therefore, if parol evidence were allowed, it is the intent of Mr. Burke that the term "property" included the WESTERN NARROWS that is relevant, not those personal beliefs of Mr. Burrells, regardless whether they concur with those of Mr. Burke. It should be noted that the petitioner erroneously points out that Leevac had curtailed deposition discovery of Burke (Pet. 11). Mr. Burke's deposition testimony, taken on two occasions, was only limited in accordance with a ruling by Magistrate Ivan Lemelle when the petitioner sought to evoke from Mr. Burke a legal conclusion, which was

protected by Mr. Burke's attorney/client privilege.[1]

Peter Borne, Global's risk manager signed the contract on Global's behalf, despite the fact that Mr. Borne had not participated in the negotiation meeting in which the disputed "property" clause was constructed. Upon his own admission, Mr. Borne did not even read the document before signing it and therefore was totally oblivious to the presence of a "knock for knock" provision in the agreements prepared by Global's General Counsel when he signed the contract. Since Borne had nothing to do with negotiating the contract and relied upon his General Counsel to formulate what he signed, his intent is similarly irrelevant.

Work began shortly after the contracts were signed. On April 28, 1988, a fire broke out in a stateroom adjacent to the bow thruster compartment of the M/V WESTERN NARROWS and quickly spread to the crew quarters and caused extensive damage to the vessel. The ensuing litigation between the two large

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1. In accordance with Sup. Ct. R. 15(1), respondent is compelled to point out what it perceives to be a misstatement of fact at Pet. 11. Global argues that Leevac curtailed Burke's deposition on the issue of fact raised by the Burke affidavit. Prior to the second Burke deposition, Leevac sought a protective order and ruling from Magistrate Ivan Lemelle regarding Burke's deposition. Burke represented Leevac in the contractual negotiations prior to the fire. Burke was also initially retained post-fire to investigate the casualty and defend Leevac and its insurer from claims of Global until such time as he voluntarily withdrew his representation. Magistrate Lemelle ruled that Leevac must produce file materials of Leevac and Burke regarding the contractual negotiations of the Master Service Agreement. Leevac did not have to produce Burke's post-fire correspondence to his client nor did Burke have to testify on those matters developed in his post-fire investigation or in reporting to his client on his opinions, conclusions and impressions of Leevac's exposure to Global's claims as this was protected by the attorney/client privilege. Global's appeal of Magistrate Lemelle's ruling was rendered moot by the ruling of Judge Nauman Scott of March 14, 1991 that parol evidence was unnecessary to interpret the clear and unambiguous language of the contract.

companies which negotiated and bargained for the release/ indemnity and insurance provisions of the contract constitutes the basis for the petitioner's appeal. Global, which prepared the language of those portions of the contract at issue, did not raise any issue regarding the interpretation of the contract's "release/ indemnity" provision nor did it question the interpretation of the word "property" until after the casualty to the WESTERN NARROWS.

REASONS FOR DENYING THE WRIT

This Court should deny review of the court of appeals' sound and well reasoned decision because there are no special and important reasons which demand the exercise of this Court's discretionary review. The controversy in this case does not involve conflicts among circuit court of appeals and state courts concerning a meaning of federal law provisions, which constitute a principal purpose for which the United States Supreme Court uses certiorari jurisdiction. *Braxton v. United States,* ___ U.S. ___ (1991); 111 S. Ct. 1854 (1991). A review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

The decisions below reflect rational findings grounded upon well established principles in the frequently litigated areas of tort and contract law. The central issue of the case involves the interpretation of an indemnity provision of an unambiguous contract. Accordingly, this case is governed by the application of Louisiana law and the well settled principles therein. The lower courts properly applied the parol evidence rule, which is well recognized in Louisiana law as well as in other jurisdictions.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS, NO FEDERAL QUESTION, AND NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO REQUIRE THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW OF THE WELL REASONED DECISIONS OF THE LOWER COURTS.

This case involves a dispute over the contractual language of an indemnity clause in a ship repair contract. The lower courts' resolution of this controversy neither consumed a federal question nor affronted contract principles in other circuits. Instead, the United States Fifth Circuit Court of Appeal based its affirmance of the district court's decision on well-settled principles of contract law and the rules of parol evidence which are well established in Louisiana law as well as in other venues. In holding that the vessel is considered "property," within the clear definition of that term within the contract, the district court not only resolved a standard contract dispute, but also reaffirmed an earlier decision on this issue. *See Todd Shipyards Corp. v. Turbine Service*, 674 F.2d 401, 423 (5th Cir. 1982).

A review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. Without carefully exercising discretion, this Honorable Court would absolve itself of its exclusive function and become inundated with trivial appeals. The Supreme Court is not, and never has been concerned with the correction of errors in lower court decisions. *(Wright & Miller, Federal Practice and Procedure*, § 4001 n.12, pp. 491-92 (1977)). It simply can not function as an ordinary appellate court concerned with achieving individual justice in individual cases. *Layne & Bowler Corp. v. Well Works, Inc.*, 261 U.S. 387, 392-393 (1923). Instead, it is relegated to the most fundamental constitutional and

statutory questions to secure uniformity for issues of general public importance. However, in the instant case, there was no error in the lower courts and this Court would needlessly reaffirm well established principles of law if it were to grant review. Moreover, the generic issues presented in the case at bar do not merit review by this Honorable Court because the conflicts over indemnity provisions at issue in this matter involve routine conclusions which are appropriately decided countless times each year by lower courts. *See Mills v. Zapata Drilling Co., Inc.*, 722 F. 2d 1170 (5th Cir. 1981); *Leenerts Farms, Inc. v. Rogers*, 421 So. 2d 216 (La. 1982).

II.

IN AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT, THE FIFTH CIRCUIT PROPERLY APPLIED THE RULES OF CONTRACT LAW AND PAROL EVIDENCE.

Global contends that this Court should review and reverse the decision of the court of appeals because it misapplied the rules governing summary judgment in failing to view the inferences to be drawn from the underlying facts most favorable to Global. However, the petitioner misinterprets the established law which controls its allegations.

The choice-of-law provision in the Work Order designated Louisiana law as the applicable law and since that law does not conflict with maritime law, the Fifth Circuit appropriately found it controlling. See *Stoot v. Fluor Drilling Services*, 851 F. 2d 1514, 1517 (5th Cir. 1988). Accordingly, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." *La. Civ. Code Art. 2046.* Before attempting to analyze the contract,

the Fifth Circuit noted that the jurisprudence has consistently held that when the words of a contract are unambiguous, one shall not look beyond the agreement's four corners for interpretation. *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 315 (5th Cir. 1988). *See also, Davis v. Huskipower Outdoor Equip. Corp.*, 936 F.2d 193, 196 (5th Cir. 1991) (Pet. App. A4).

Based upon interpretation guidelines which have been established within the jurisprudence, the Fifth Circuit found that the Master Service Contract explicitly states that Global agreed to release and indemnify Leevac against any claims for damage to Global's property, which is then expressly defined within the contract to include "all property (real or personal). . ." (Pet. App. A50). The clear and unambiguous language of the contract requires no further interpretation. As in *Polozola v. Garlock. Inc.*, 343 So. 2d 1000,1002-1003 (La. 1977), in which the court enforced an indemnity provision despite the technical argument that "Dow's negligence" did not include the negligence of Dow's agents, servants and employees, the lower courts properly dismissed Global's technical arguments of the interpretation of "property." Thus, the introduction of parol evidence was properly denied.

Petitioner attempts to skip logical steps in asserting that consideration of parol evidence was erroneously omitted by the district court when in fact, the parol evidence rule prevents the introduction of evidence to vary the terms of the written contract. Under Louisiana law, testimonial evidence may not be admitted to negate or vary the terms of an act under private signature. *La. Civ. Code Art.* 1848. Petitioner cites *Garza v. Marine Transport Lines, Inc.*, 861 F. 2d 23 (2nd Cir. 1988) for the proposition that extrinsic evidence is allowed. However, the Court in *Garza* admitted such evidence only after finding ambiguity in the agreement. This is clearly distinguishable from what Global attempts, because the agreement at issue actually defines "property" and therefore the

term can not be construed ambiguously. Moreover, it is well recognized in contract law that any ambiguity in a contract must be construed against the drafter, in this case, Global. *La. Civ. Code Art.* 2056; *Kryzwick v. Tidewater Equipment Co., Inc.*, 600 F. Supp. 629 (D. Md. 1985); *Navieros Oceanikos v. MOBIL TRADER*, 1977 A.M.C. 739 (2nd Cir. 1977). In light of these governing rules, there could be no genuine issue as to any material fact that would merit the introduction of extrinsic evidence to interpret a clear and unambiguous contract. Accordingly, summary judgment was proper in rejecting parol evidence and ruling on the contract as a matter of law.

CONCLUSION

Global contends that the decisions below ignored the proper standard for consideration of a motion for summary judgment, and that parol evidence should have been admitted to resolve the interpretation of the release and indemnity provisions of a contract. The record clearly indicates that there was no ambiguity in the contract and that Global drafted the language which they are contesting. Accordingly, as has been done in countless other actions, the well established rules governing contract law and indemnification definitively have resolved this case. This case did not involve a federal question and has been concluded without any conflict between circuits and with strict adherence to the standard course of judicial proceedings. Therefore, the petition for certiorari is not well founded, and should be denied by the Court.

Respectfully submitted,

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